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IN THE

Supreme Court of the United States

October Term, 1947.

No. 622

WESTERN UNION TELEGRAPH COMPANY, - - - - - - - - - Petitioner,

versus

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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February 25, 1948.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

TABLE OF CASES CITED.

TABLE OF STATUTES CITED.

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WESTERN UNION TELEGRAPH COMPANY, - *Petitioner,*

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Western Union Telegraph Company, hereby petitions this Honorable Court for a writ of certiorari to be issued to review the judgment entered in the United States Circuit Court of Appeals for the Sixth Circuit on December 9, 1947 (petition for rehearing denied January 12, 1948, R. 1243), in the above-entitled cause.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, dated December 9, 1947, and not yet reported, is printed at R. 1214. A petition for rehearing was filed on December 29, 1947 (R. 1231), and denied without opinion on January 12, 1948 (R. 1243).

The District Court did not deliver an opinion but made Findings of Fact and Conclusions of Law which are printed at R. 69 and are not yet reported. The judgment of the District Court is printed at R. 88.

JURISDICTION.

The judgment of the Circuit Court of Appeals (R. 1213) was entered on December 9, 1947. The petition for rehearing was denied January 12, 1948 (R. 1243). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (43 Stat. 938, Sec. 1; 28 USCA Sec. 347).

STATUTES INVOLVED.

The pertinent provisions of the Fair Labor Standards Act (29 U. S. C. A. §201 *et seq.*) and of the Portal-to-Portal Act (29 U. S. C. A. §251 *et seq.*) are set forth in the Appendix.

SUMMARY STATEMENT OF FACTS.

The suit was filed by the Administrator of the Wage and Hour Division, United States Department of Labor (herein called the Administrator), against the Western Union Telegraph Company (herein called the Telegraph Company) and Bluegrass Hotels, Inc., the Telegraph Company's 9-A agent (a designation hereinafter explained p. 17) at Paris, Kentucky, seeking an injunction against alleged violations of the Fair Labor Standards Act at Paris, Kentucky. Subsequently the Administrator amended his petition to add 14 additional towns in Kentucky where there were 9-A agencies but the 9-A agents in such additional towns were not made parties. During the course of the trial the Administrator again amended his petition by withdrawing therefrom 7 of the 14 towns in Kentucky which had been added to the original petition.

At least as far back as 1931, the Telegraph Company began the installation of 9-A agencies in small towns (R. 805). Competition of long-distance telephone and competition of air mail was resulting in deficit operations in a number of small communities (R. 814). In order to meet this situation and continue to give telegraph service to these small communities, the Telegraph Company evolved the plan of the 9-A agent in small municipalities (R. 813).

That is, instead of the Telegraph Company maintaining its own office with the resulting expense of rent, heat, light, janitor service, payroll, etc., the Telegraph Company turned its business in these small communi-

ties over to some local, already established, business concern with a good location and usually with sufficient personnel on hand to take care of the small amount of telegraph business incident to small municipalities (R. 813). Such already established businesses were hotels, garages, etc.

The advent of the teleprinter shortly prior to that time made these 9-A agencies possible. Under the old Morse code system, the equipment at both the sending and receiving ends of a telegraph line were such that dots, dashes, pauses, etc., were used to transmit the various letters of the alphabet. This required special training and long experience in order that an operator could either send or receive telegraph messages. The teleprinter, on the other hand, resembles and is operated similar to an ordinary typewriter. The teleprinter has a keyboard exactly like a typewriter keyboard. When a telegraph message is to be sent, all that the operator has to do is to type it out on the teleprinter, just as would be the case with a typewriter, and the typewritten message comes out at the receiving office on a thin ribbon of paper which is then pasted on a regular telegraph blank and is ready for delivery. The message also comes out at the sending office on a thin ribbon of paper which can be likewise pasted on a telegraph blank and preserved.

Therefore, almost anyone who worked for a hotel, garage, etc., was competent, with a very little training, to both send and receive telegraph messages (R. 826).

The 9-A agent is paid a commission on gross business and in some cases an allowance for delivering

messages. The rates for sending a telegram from any place to any other place are fixed by tariffs promulgated or approved by the Federal Communications Commission. Neither the Telegraph Company nor any of its employees or agents can charge anyone either more or less than the rate prescribed by the Commission. Such rates covering the entire Country are in printed tariff books which are furnished each 9-A agent and anyone else who sends paid or receives collect telegrams.

The Telegraph Company furnishes a teleprinter, certain other equipment, telegraph blanks, etc. The 9-A agent also furnishes equipment such as tables, chairs, typewriter, etc. The agent also pays the expense of rent, wages, light, heat, janitor service, etc. The agent selects whom he pleases to do the telegraph work. Such work can be done by four employees of the 9-A agent as at the hotel agent at Cynthiana, Kentucky, or principally by one employee as at the garage at Georgetown, Kentucky, or the agent can do the work himself as at Nicholasville and Versailles. (All four of these Kentucky towns were involved in the suit and are covered by the judgment herein.) The Telegraph Company has nothing whatever to do with hiring, firing, or the fixing of wages or hours of the employees of the 9-A agent who do hotel, garage, or other work for the 9-A agent during the same time that they also do such telegraph work as may arise during their respective hours of duty. The agent does the hiring and firing and fixes both the compensation and hours of service of its employees who, as an in-

cidental part of their other duties, also do telegraph work at the same time.

The agents pay, and have always paid, the entire wages or salary of their employees who operate the telegraph equipment at the same time they are attending to the agent's regular business. Such employees of the 9-A agents have always looked solely to the agent for remuneration for services for all work rendered for the agent including the telegraph work.

The Company maintains that the 9-A agents are independent contractors and that their employees who do telegraph work at the same time they are performing the regular work of the 9-A agent are the employees of an independent contractor. The District Court held that the 9-A agents were not independent contractors, but employees of the Telegraph Company and that the employees of the 9-A agents who operated any telegraph facilities were employees of the Telegraph Company.

Following is a brief statement of the facts and practices at each of the 9-A agencies in the order named in the judgment of the District Court.

Cynthiana.

The Cynthiana Hotel Co., a corporation, was 9-A agent from December, 1939 (Plaintiff's Collective Exhibit No. 157), until July, 1946, when the corporation leased the hotel to a partnership of four persons doing business as the Harrison Hotel Co. (R. 1137). The partnership has been agent since July 1, 1946. It is

also the ticket agent for the Greyhound Bus Lines (R. 791).

The teleprinter at all times has been located in the hotel lobby and is now adjacent to the hotel desk where bus tickets are sold.

During the hours of telegraph service, at least four persons, including one of the partners, either alone or two at a time, do the hotel desk work, sell bus tickets, and also the telegraph work.

A Mrs. Renaker, the only local witness introduced by the Administrator, estimated that about 50% of her time was spent on telegraph work and 50% on other work (R. 782). Mr. Willis, the working partner, introduced by the Telegraph Company, estimated that she spent 40% of her time on telegraph work (R. 1141). There was no estimate as to how much time the other three persons who also operated the teleprinter spent on telegraph work or on the hotel, bus, etc., work.

The working partner, Mr. Willis, has done all of the employing, discharging, fixing hours of work, rates of pay, reassignment of hours, and the actual payment of wages. The Telegraph Company has had no part in any of these matters (R. 1138, *et seq.*).

Georgetown.

Mr. L. S. O'Dell has been 9-A agent since October, 1942, under a written contract which is still in effect (R. 1163). At the time he became such agent he was the owner of a garage, had the sales agency for Buick and Pontiac cars and G. M. C. trucks. He was also ticket agent for Southeastern Greyhound Bus Lines, and had a small cigar or confectionery counter

(R. 1163, *et seq.*). When he became bus agent he employed a Miss Green (R. 698, 1164) and when he later became agent for the Telegraph Company Miss Green was able to take on the telegraph work in addition to selling bus tickets and operating the counter (R. 679, *et seq.*, 1166). Mr. O'Dell himself does this work at times (R. 684). All three of these businesses are conducted at a counter at one side of the automobile showroom (R. 678).

The person handling these businesses spends approximately 50% of her time on telegraph work, 40% on bus ticket work and 10% on the cigar counter (R. 1166). The gross revenue per day runs about $15.00 each for the confectionery counter and the telegraph work and $100.00 for the bus ticket agency (R. 679-699, 1166).

Mr. O'Dell employed Miss Green, fixes her rate of pay, has given her raises, pays her (she is actually paid from the bus ticket drawer, R. 676), assigns her hours and otherwise exercises the indices of an employer. The Telegraph Company has had nothing to do with any of these matters (R. 681, *et seq.*, 1164, *et seq.*).

Harrodsburg.

Mr. N. L. Curry, an insurance man, became 9-A agent in May, 1939, and continued until he retired from the insurance business at the end of February, 1943. On March 1, 1943, his insurance partner, J. W. Coakley, became and has continued to be the 9-A agent (Plaintiff's Collective Exhibit No. 161).

The teleprinter is located in the insurance office and and the work has been handled by a succession of stenographer-secretaries (R. 643, *et seq.*). Mr. Coakley has only one employee (R. 646) and spends most of his time away from the office (R. 653, 661). The employee spends less than 75% of her time on telegraph work and more than 25% on insurance work (R. 645, 646). Mr. Coakley would require at least a part-time employee if he did not have the telegraph business (R. 654), and testified that if he did not have the telegraph business (R. 654) it would be good for his insurance business to have someone in the office all the time (R. 646). During the two years Mr. Coakley was in the Army, both the telegraph and insurance businesses were continued in his name (R. 656, 769), and were attended to by his wife and a stenographer-secretary (R. 468).

Mr. Coakley employed all of the stenographer-secretaries, fixed their hours, fixed their salaries, vacations, lunch periods, etc., and paid their salaries from his insurance bank account (R. 654, *et seq.*). He also hires delivery boys and delivers "a lot of them myself" (R. 658). The Telegraph Company has had nothing to do with any of these matters.

Irvine.

Formerly the 9-A agent was a telephone company, then the owner and manager of the Colonial Hotel (R. 795, 1035), and in June, 1946, R. E. McClanahan, manager of the same hotel, became agent (R. 1019) when his father bought the hotel (R. 1034). The

hotel and telegraph businesses are operated as a family partnership, in so far as profits are concerned, as are theaters, a finance company and an insurance agency in Irvine (R. 1017, 1034).

The telegraph equipment is adjacent to the hotel desk and in line with it. The telegraph work is done by McClanahan, his wife and a Miss Henry. Miss Henry attends to hotel desk work, is secretary to McClanahan, and spends about one-third of her time on telegraph work during her tour of duty (R. 1019-1021). She would be required if McClanahan did not have the telegraph agency (R. 1024).

McClanahan is active in a number of civic affairs (R. 1037) in addition to the many family businesses and managing the hotel. He employed Miss Henry, fixes her rate of pay, hours of work, time off, pays her wages, and otherwise exercises all of the indices of an employer (R. 1022, *et seq.*). The Telegraph Company has had nothing to do with any of these matters.

Morehead.

Since November 1, 1945, C. E. Clements, lessee and manager of the Midland Trail Hotel, has been the 9-A agent. The telegraph equipment has been located in the hotel lobby and is now behind the hotel desk (R. 1063-1066).

Clements has had two employees who operate the teleprinter in addition to their hotel desk work. There was no estimate as to the amount of time spent by these persons on telegraph work as compared with hotel desk work. Clements hired these persons, fixes their

hours, rates of pay, and pays them. The Telegraph Company has had nothing to do with any of these matters.

Nicholasville.

Since July 1, 1940, Miss Rose has been the 9-A agent (R. 1208) and also agent for the Railway Express Company (R. 742). She is paid on a commission basis by both companies and owns a truck used for deliveries for both companies (R. 735-736).

For many years previously, her father had operated a Morse telegraph instrument as either employee or agent. In addition, he was agent for the Railway Express Company, representative of an Interurban Railway Company (R. 750) and had an insurance agency. Before retiring on July 1, 1940, he wrote the Telegraph Company requesting that a teleprinter be installed and that his daughter be appointed agent (R. 747-748).

Miss Rose receives $50 to $100 a month (50% commission plus $8.00 delivery allowance) from the Telegraph Company and $60 to $200 a month (10% commission) from the Railway Express Agency (R. 742, *et seq.*). She made no estimate of the allocation of her time between telegraph and express work.

Mr. Rose continues his insurance agency and both the telegraph and express businesses of Miss Rose are in the insurance agency office (R. 756). The building has an insurance sign but Miss Rose has refused to allow any sign pertaining to the Telegraph Company be placed in the office window (R. 758, 761).

In so far as the Telegraph Company is concerned, Miss Rose can do all of the telegraph work herself or can have all or part of it done by one or any number of persons selected by her.

Paris.

On August 2, 1945, the 9-A agency arrangement was discontinued and since that time the Telegraph Company has maintained its own office in Paris with its own employees so that Paris is not really involved, although covered by the District Court's Judgment.

Versailles.

Mrs. E. F. Wooldridge has been 9-A agent since June 5, 1946 (R. 718, 719). At that time she was cashier of the Central Kentucky Natural Gas Company at Versailles (R. 728), is paid a monthly salary by that Company (R. 732) and had considerable spare time (R. 723). The vice president of the Gas Company was glad for her to have additional income (R. 723). The telegraph equipment is located in the Gas Company's office. When Mrs. Wooldridge desires to be away from the office she would "just tell them when I would be back" (R. 729).

In so far as the Telegraph Company is concerned, Mrs. Wooldridge can do all of the telegraph work herself or can have all or part of it done by one or any number of persons selected by her.

The Telegraph Company maintains that the Findings of Fact of the District Court (R. 69) are clearly

erroneous in that they fail to state the actual facts or practices at any of the places named in the judgment. No one can tell from such Findings of Fact whether the agency is at a hotel, garage, etc., or whether the telegraph work is done by the agent personally or by one or what number of employees or what other work the agent or the employees of the agent do at the same time they are doing the telegraph work, such as hotel desk work, selling bus tickets, etc.

The District Court adopted verbatim the "Findings of Fact" that had been submitted by the Administrator (R. 69).

The Telegraph Company has trouble in getting 9-A agents in small towns (R. 829). Such agents are treated even better than customers because it is hard to find a satisfactory agent in little towns (R. 831).

The Telegraph Company has employment standards for its own employees. Applicants prior to being employed must have a high school education; be of certain height; fill out application forms; pass a strenuous physical examination; pass a mental test; be between the ages of 21 and 30 years; the weight must be in line with height or they will not be passed by the medical department. If the above qualifications are met, they are employed and start training in teleprinter operations of from four to six weeks. After such training period, they must attain a speed of 60 messages an hour with not more than two major errors in transmitting and no major error in receiving and gumming 60 messages an hour. After the training

period and tests their efficiency on the teleprinter is checked by monitoring everything they do and all their receipts and charges are checked and audited by the Company's bookkeeping department (R. 834-835).

None of the above standards or tests or training period apply to any 9-A agents or to any of the employees of a 9-A agent (R. 835-836).

The Company has two types of test messages. One type is to test the honesty of the Company's employees. This test message is used primarily for the protection of the public and is filed at the Company's own offices and also at the 9-A agency offices. The other test message is to test the efficiency of the Company's employees; that is, the Company employees are required to do a certain amount of sales work. Thus, if a party files a telegram at a Company office announcing his arrival at a certain town, the Company employee is required to suggest a wire to a hotel for a reservation. Also, if a death message, or a birth, etc., message is sent, such inquiry must be made as to whether or not there is anyone else that should be notified. The object of this class of test message is a service to the customer and additional revenue for the Telegraph Company. This type of sales test message is never sent from a 9-A office (R. 834-838).

ADDITIONAL GENERAL FACTS.

The Telegraph Company desired to place the agencies with established business concerns primarily because of the stability of such an arrangement and also because of their financial responsibility (R. 813, *et seq.*). Other factors concerned were location, employees to handle the telegraph work, hours observed by the business and type of business (R. 828, *et seq.*). In so far as possible, agency arrangements were attempted to be made where the previous employees of the business man had sufficient time to handle the telegraph work without additional hours (R. 306).

The 9-A agent is not required to make any reports or to keep any records except the original copy of sent telegrams, which are retained for six months, pursuant to regulations of the Federal Communications Commission. Operations at all points involved in this case are conducted by teleprinter which is connected by wire to an office of the Telegraph Company known as the "relay" office. This relay office receives and retransmits messages originating at the 9-A office, transmits messages terminating at the 9-A office, and computes the amount which should have been collected by the agent. The "controlling" office bills the agent monthly for the amount which should have been collected, less commissions and allowances (in some cases the agent is billed for the full amount and receives a check for the amount due for commissions and allowances). Money order principal is supposed to be remitted daily by the agent. The term "controlling

office" is used by the Telegraph Company in the sense of "comptrolling office," and relates only to financial matters (R. 1130). In most cases the relay and controlling office are the same, but may be different (R. 1129). The agent customarily keeps revenue from telegraph business in a separate bank account in its or his name, but this is not a requirement of the Telegraph Company according to testimony of the various witnesses (R. 552, 655, 959), and the fact that no such separate bank account was kept at Stearns (R. 994). Money in such separate bank accounts is not subject to the control of the Telegraph Company, or any one except the agent or persons authorized by him.

The agent is bonded when he is an individual and many of the employees of the agents are bonded by the Telegraph Company under a blanket bond with the American Surety Company of New York. By special letters dated October 14, 1938, and July 13, 1944 (R. 1126-1128), the bonding company agreed as to agency risks that "if the agent or an employee of the agent misappropriates money or property and the agent is financially unable to take care of his obligations, such misappropriation is a proper claim under our bond." The telegraph business of an agent is carried on in connection with a "Western Union" sign and the agent generally carries a separate telephone listing of his telephone under the name "Western Union."

The Telegraph Company first installed teleprinters, as they became available, in its own offices (R. 826). Then teleprinters were installed in customers' offices whose telegraph business was large enough to justify

it. These customers are known as "tie-line customers." A "tie-line customer" is a private customer with enough telegraph business to have a teleprinter in his or its own office. The teleprinter is connected with the Telegraph Company's own office. The "tie-line customer" is similar as to training of operators, visits by company representatives, etc., to a 9-A agency, but does not usually accept messages from the public (R. 827).

The Company instituted a program of converting to 9-A operation certain unprofitable and deficit Company offices in small towns where the number of messages, and hence the revenue, was small (R. 827). In 1931, the Telegraph Company asked and received permission from the Georgia Public Service Commission to change Company offices at East Point and Decatur, Georgia, to 9-A agencies, at that time known as 11-B agencies (Defendant's Exhibits Nos. 3 and 4, copied R. 806, 807, 808).

The agent receives considerable mail from the Telegraph Company ranging from specific suggestions to general tariff information. Representatives of the Telegraph Company make visits to the 9-A agencies approximately every six months at which time they may be asked any questions, and at which time they make survey reports with respect to each agency visited.

The designation "9-A" is one of a set of classifications of agencies of various types of the Telegraph Company. Classes 1, 2 and 3 all refer to Company operated offices (Plaintiff's Exhibit No. 20, R. 197).

Classes 4 and 5 refer to operations through an agency at railroad company offices. There are more than 10,000 separate small towns served by railroad offices (Plaintiff's Exhibit No. 5).

The classification 9-B is an agency within a city where there is also a company office, as at hotels. The classification 9-C includes Army and Navy camps and bases which are operated by civil or military employees of the United States Government (Plaintiff's Exhibit No. 20, R. 872) such as the military agencies at Fort Knox, Kentucky, and the Fort Thomas, Kentucky, Army Post (Plaintiff's Exhibit No. 5, R. 873).

The Telegraph Company maintains that the Findings of Fact of the District Court are clearly erroneous in that the few isolated mistakes made at a few of the agencies over a considerable period of years are taken as typical of general conditions. These admitted mistakes are referred to in the footnote of the opinion of the lower court (R. 1217). These admitted mistakes had been rectified long prior to the time of the trial.

QUESTIONS PRESENTED.

(1) Are the above 9-A agents, each of whom has a primary business in addition to the telegraph agency, independent contractors or the employees of the Telegraph Company within the meaning of the Fair Labor Standards Act?

The decision of the District Court and of the Circuit Court in this case that such agents are employees of the Telegraph Company is in direct conflict with

the decision of the Fourth Circuit Court of Appeals in the case of *Blankenship* v. *Western Union,* 161 Fed. 2d 168. The Fourth Circuit Court of Appeals held that such agents were independent contractors and not employees of the Telegraph Company.

(2) Are the employees of the 9-A agents listed above, whose hiring, firing, rates of pay, hours of service, etc., are all done by the 9-A agent and who attend to the primary business of the 9-A agent at the same time they do telegraph work, the employees of such 9-A agent or the employees of the Telegraph Company within the meaning of the Fair Labor Standards Act?

(3) Does the Fair Labor Standards Act give the courts the power to enjoin the Telegraph Company from employing or suffering or permitting any persons (which, of course, includes the employees of any 9-A agent) to operate its telegraph facilities "who *receive* wages for the time required to be present and available for such service as well as actually engaged therein at rates less than * * * " the minimum fixed by the Act?

The Act requires an employer to "*pay*" an employee certain minimum wages.

(4) Does the Portal-to-Portal Act of 1947 withdraw jurisdiction from the courts to grant an injunction against the Telegraph Company where, without contradiction, the evidence showed that the telegraph work involved by the employees of the 9-A agents was not compensable by the Telegraph Company by either an express provision of a contract or a custom or prac-

tice between the Telegraph Company and the employees of the 9-A agents?

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Sixth Circuit Court of Appeals involved herein is in conflict with the decision of the Fourth Circuit Court of Appeals (*Blankenship* v. *Western Union*, 161 Fed. 2d 168, decided April 9, 1947) on the same matter.

(2) The Sixth Circuit Court of Appeals has decided a Federal question in a way that is in conflict with applicable decisions of this Court.

(3) The Sixth Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court.

CONCLUSION.

For the reasons herein set forth, it is respectfully submitted that the Writ should be granted.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW.

Reference to the opinion of the Circuit Court of Appeals and to the Findings of Fact and Conclusions of Law of the District Court are made in the petition, page 2.

II.

JURISDICTION.

The statutory provisions under which the jurisdiction of this Court is invoked, is shown in the petition, page 2.

III.

STATEMENT OF THE CASE.

This appears in the petition, beginning at page 3.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

Errors to be urged are those specified in the petition, pages 18 and 19 under the heading "Questions Presented."

V.

ARGUMENT.

Point I.

The Decision of the Court Below is in Conflict With the Decision of the Fourth Circuit Court of Appeals on the Same Matter.

The court below held that the 9-A agents involved herein, each of whom had a primary business, and who operated any telegraph facilities or equipment, were employees of the Telegraph Company and not independent contractors under the Act. The court also held that the employees of 9-A agents who attended to the primary work of the 9-A agent during the same hours that they operated telegraph facilities or equipment were employees of the Telegraph Company and not employees of an independent contractor under the Act.

The Fourth Circuit Court of Appeals has held the opposite on the same matter.

Blankenship v. *Western Union,* 161 Fed. 2d 168 (CCA 4); April 9, 1947.

Blankenship and Patrick, a partnership, operated a hotel at Mullens, West Virginia, and were also the Telegraph Company's 9-A agent at that place. They brought suit against the Telegraph Company for a declaratory judgment contending that they were employees of the Telegraph Company under the Fair Labor Standards Act. The District Court (S. D.,

West Virginia) held that members of a partnership are not "employees under the Act" and also that an independent contractor relationship existed (67 F. Supp. 5). On appeal, the Fourth Circuit affirmed and held that a partnership cannot be an employee under the Act and also held that a "stronger reason" for the decision was that the status or relationship between the parties was that of an independent contractor. The Fourth Circuit said:

> "The primary and, of course, most important business of the plaintiffs was the operation of the Guyandotte Hotel, for which the partnership was formed. The telegraph agency was merely one out of a number of incidents of the hotel business.
>
> "The telegraph agency was operated on premises absolutely controlled by the plaintiff. These premises were far removed from defendant, and the office, to which plaintiffs reported and from which they received instructions, was not in Mullens but in Beckley, another town. The daily number of hours worked by the plaintiffs and many details of their work could not be within the first-hand knowledge of Western Union.
>
> "It is clear that the plaintiffs were not required to devote their full and exclusive time to the telegraph agency. Obviously, a great advantage to the plaintiffs was that they could give to the telegraph agency odds and ends of their time, on which the hotel clearly had first call.
>
> "Quite important is it, we think, that the contract does not require that the plaintiffs personally perform the services required for the operation of the agency. The complaint clearly dis-

closes the performance of some of these services by persons hired for that purpose by the plaintiffs.

* * * * * * * *

"Under the contract, plaintiffs were to be compensated on a specified percentage of the receipts of the agency, not by a fixed salary or wages. Plaintiffs further agreed to endeavor to increase the business of the agency. Their compensation thus depended on their own activities and their success. And, under a provision of the contract, the plaintiffs assumed 'all other expenses necessary to properly handle the telegraph company's business.' By the supplemental agreement, a portion of the compensation was allotted to rental charges, the balance was to represent remuneration for services.

"In Paragraph VI of their complaint, plaintiffs assert:

> 'That they are receiving from said respondent, monthly, each for his and her services, *or services performed on their behalf,* to the respondent company, a monthly sum less than that prescribed and set forth by the Fair Labor Standards Act of 1938 * * *.' (Italics Ours.)

"Thus the plaintiffs do not claim that they are receiving for their services less wages than those prescribed by the Act. The allegation is that substandard wages are received *either* for their services *or* for the services of others whom they (not Western Union) have employed. Surely the ambit of the Act cannot properly be stretched to cover the employees of an 'employee,' who are paid by, and subject to the control of, the person who employed them and not the original 'employer.'

* * * * * * * *

"It might be added that the Fair Labor Standards Act was originally intended to regulate minimum wages and maximum hours for wage-earners on a low economic level who needed such protection in order to secure satisfactory labor conditions. Certainly the Act did not contemplate that the employees should be the operators of a business on their own account to which business the services to be rendered to the so-called employer would be merely incidental. Nor was the Act intended to cover contracts between employers or to establish a minimum compensation for services rendered by one employer to another.

"The judgment of the District Court is affirmed."

Thus the Telegraph Company is in a most difficult position. The Fourth Circuit has held that the 9-A agents are independent contractors and that the employees of the independent contractors who also do telegraph work are not employees of the Telegraph Company, but of the 9-A agent. The Sixth Circuit has held exactly to the contrary. The Company's operations are nationwide.

Point II.

The Decision of the Court Below is in Conflict With Applicable Decisions of This Court.

United States v. *Albert Silk.*
Harrison, Collector, v. *Greyvan Lines,* 331 U. S. 704, 67 S. Ct. 1463, decided June 16, 1947.

These two cases involving the collection of Social Security Taxes were decided together. In the Silk

case this Court held that persons who unloaded coal from railroad cars were employees but that truck men who owned their trucks and delivered coal to customers were "independent contractors."

In the Greyvan case this Court held that the truck men were "independent contractors." As to the actual set-up, the control exercised by the Company, the instructions issued by the company, insurance, etc., the opinion states:

> "* * * The company's instructions covered directions to the truckmen as to where and when to load freight. If freight was tendered the truckmen, they were under obligation to notify the company so that it could complete the contract for shipment in its own name. As remuneration, the truckmen were to receive from the company a percentage of the tariff charged by the company varying between 50 and 52% and a bonus up to 3% for satisfactory performance of the service. The contract was terminable at any time by either party. These truckmen were required to take a short course of instruction in the company's methods of doing business before carrying out their contractual obligations to haul. The company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used, and to which the truckmen, at intervals, reported their positions. Cargo insurance was carried by the company. All permits, certificates and franchises 'necessary to the operation of the vehicle in the service of the company as a motor carrier under any Federal or State Law' were to be obtained at the company's expense."

In stating the law as to who were employees and who were independent contractors, the opinion reads in part:

"* * * The word 'employee,' we said, was not there used as a word of art, and its content in its context was a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.' We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a matter of economic reality. * * * "

"* * * The taxpayer must be an 'employer' and the man who receives wages an 'employee.' There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. * * *"

* * * * * * * *

"* * * But we agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

Walling, Admr., v. *Portland Terminal Company*, 330 U. S. 148.
Walling, Admr., v. *Nashville, Chattanooga & St. Louis Railway Company*, 330 U. S. 518.

In these two cases, decided the same day, this Court held that railroad trainees who did railroad work but whose employment did not contemplate compensation by the railroad company were not employees within the meaning of the Act. In the Portland case, the opinion states in part:

> "The Fair Labor Standards Act fixes the minimum wage that employers must pay all employees who work in activities covered by the Act. There is no question but that these trainees do work in the kind of activities covered by the Act. Consequently, if they are employees within the Act's meaning, their employment is governed by the minimum wage provisions. But in determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. See N.L.R.B. v. Hearst Publications, 322 U. S. 111, 128-129. * * *"
>
> * * * * * * * *
>
> "Without doubt the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation. This is shown by §14 of the Act which * * *. This section plainly means that employers who hire beginners, learners, or handicapped persons, and expressly or impliedly agree to pay them compensation, must pay them the prescribed minimum

wage, unless a permit not to pay such minimum has been obtained from the Administrator. * * * "

* * * * * * * *

"* * * The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. * * *"

Boutell v. *Walling,* 327 U. S. 463, February 25, 1946.

This was a suit by the Administrator against two individuals to enjoin them from violating the maximum hours provisions of the Act. The two individuals were members of a partnership of four who did business as F. J. Boutell Service Company. The other two partners were not subject to the jurisdiction of the district court. These four partners were also the sole stockholders of the Boutell Drive-Away Company, a Michigan corporation which was engaged in the transportation of automobiles, etc., in interstate commerce.

The employees of the partnership Service Company were mechanics, engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the corporation Drive-Away Company. In fact, it was stipulated and the trial court found that the partnership Service Company was engaged exclusively in rendering such service to the corporation and that the corporation "is an entity separate and distinct" from the partnership.

Thus the same four individuals owned (a) a corporation that was engaged in the motor transport of goods in interstate commerce and (b) a partnership which did nothing but service the transportation used in interstate commerce.

It goes without saying that since the same four persons owned the corporation and also composed the partnership that there was the same supervision and control over the employees of both.

Although the employees of the partnership did nothing but service the equipment of the corporation, this Court held that the employees of the partnership were not the employees of the corporation.

This is in conflict with the judgment of the court below in the instant case that anyone who worked on the equipment of the Telegraph Company was an employee of that Company notwithstanding that such person was the employee of a bona fide partnership, corporation, or individual.

If four individuals can set up a corporation engaged in motor transportation in interstate commerce and the same individuals set up a partnership whose employees do nothing but work on the corporation's equipment and the partnership employees are held not to be the corporation's employees it necessarily follows that the Telegraph Company can make a good faith independent contractor contract with perfect strangers, *i. e.*, the partnership hotel at Cynthiana, the individual automobile man at Georgetown, etc., and the employees of the independent contractor are not the employees of the Telegraph Company.

It is true that this Court said, in the course of the opinion, that the case was

> "decided upon the basis that the parties have stipulated and the trial court has found that these employees are employees of the partnership, the Service Company * * *."

Each and every one of the employees of any 9-A agent involved herein are the bona fide employees of such agent and attend to the primary work of that agent.

Furthermore, since the employees themselves could not stipulate or contract or waive their rights (*Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697), it necessarily follows that counsel could not stipulate away nor the district court "find" away their rights.

Point III.

The District Court Was Required to Amend the Act in Order to Write Its Judgment (R. 88) Which Was Affirmed by the Circuit Court.

The pertinent part of the judgment is as follows:

> "* * * the defendant, Western Union Telegraph Company, its officers * * * be and they hereby are permanently enjoined and restrained from violating the provisions of Sections * * * of the Fair Labor Standards Act * * * hereinafter referred to as the Act, at Cynthiana, Georgetown, Harrodsburg, Irvine, Morehead, Nicholasville, Paris and Versailles, all in the State of Kentucky, in that:
>
> "(1) The Western Union Telegraph Company shall not employ or suffer or permit to be

> employed, in the operation or for the purpose of operating defendant's facilities or equipment used in carrying on its telegraph business at the above places, any persons who *receive* wages for the time required to be present and available for such service as well as actually engaged therein, at rates less than * * *" the minimum fixed by the Act.

There was a similar provision as to hours of work and the keeping of records.

The Act requires an employer to "*pay*" an employee certain minimum wages. The judgment enjoins the Telegraph Company from permitting anyone to operate its facilities "who *receive* wages for the time required to be present and available for such service as well as actually engaged therein at rates less than * * *" the minimum fixed by the Act.

The court recognized that the Telegraph Company could hardly be required to "*pay*" the partner and the three hotel clerks at Cynthiana and Miss Green at Georgetown, etc., for time spent on hotel, bus ticket, garage, etc., work. At any rate the court changed the requirement of the Act, and we submit, changed the purpose and intent of the Act as well, when it enjoined the Telegraph Company from permitting any persons "to operate its facilities who 'receive' " less than the minimum.

None of the 9-A agents "receive" wages from anyone at any time. Each is engaged in a primary business and makes profits or suffers losses from such primary business.

Point IV.

Effect of the Portal-to-Portal Act.

Section 2(d) of the Portal-to-Portal Act of 1947 withdraws the jurisdiction of courts of the United States from any action or proceeding to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of that Act. The statement of the managers on the part of the House made it clear that the words "any action or proceeding" include injunctions.

The activity of the employees of the 9-A agents during such time as they are performing telegraph work has never been compensable by the Telegraph Company by either an express provision of a written or nonwritten contract or a custom or practice between such employees of 9-A agents and the Telegraph Company. No contract exists between the Telegraph Company and the employees of the 9-A agents and the Telegraph Company does not make payments to employees of the 9-A agents, directly or indirectly, as compensation for their activity in doing telegraph along with their other duties for the 9-A agents.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Excerpts From the Fair Labor Standards Act.

29 U. S. C. A. 206.

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title,

(5) * * *"

(June 25, 1938, c. 676, §6, 52 Stat. 1062; June 26, 1940, c. 432, §3 (e), (f), 54 Stat. 616.)

29 U. S. C. A. 207.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *"

(June 25, 1938, c. 676, §7, 52 Stat. 1063, as amended Oct. 29, 1941, c. 461, 55 Stat. 756.)

29 U. S. C. A. 215.

"(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title, it shall be unlawful for any person—

* * * * * * * *

"(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

* * *"

(June 25, 1938, c. 676, §15, 52 Stat. 1068.)

29 U. S. C. A. 217.

"The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, Title 28, sec. 381), to restrain violations of section 215 of this title. June 25, 1938, c. 676, §17, 52 Stat. 1069."

Excerpts From the Portal-to-Portal Act of 1947

29 U. S. C. A. 251.

Part I

Findings and Policy

"Section 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices

would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

"The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

"The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

"The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

"(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and

obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

Part II

29 U. S. C. A. 252.

Existing Claims

"Sec. 2. Relief from Certain Existing Claims Under the Fair Labor Standards Act of 1938, as Amended, the Walsh-Healey Act, and the Bacon-Davis Act.—

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

* * *"

(Act of May 14, 1947, c. 52, 61 Stat. 84-85.)